No. 43985-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RANDY ANDERSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
The Honorable James J. Dixon, Judge
Cause No. 12-1-00383-5

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

Washington Supreme Court Decisions

Decisions Of The Court Of Appeals

Statutes and Rules

Other Authorities

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Anderson's CrR 3.3 right to a speedy trial was violated.

2. Whether Anderson's prior California conviction was properly proved so as to count in his offender score.

3. Whether the court erred by failing to determine whether prior convictions encompassed the same criminal conduct.

B. STATEMENT OF THE CASE.

The State accepts Anderson's statement of the case. Any additional facts will be included in the argument below.

C. ARGUMENT.

1. There was no violation of Anderson's right to a speedy trial under CrR 3.3.

Anderson claims a speedy trial violation under CrR 3.3; he does not argue a constitutional violation. Appellant's Opening Brief 7-10. On June 7, 2012, following a mistrial, trial was set for the week of July 30, 2012. CP 100. Because Anderson was held in custody, the 60-day limit applied. CrR 3.3(b)(1). At a hearing on July 9, 2012, the prosecutor explained that when the July 30 date was set, right after the jury in the first trial had announced it could not reach a verdict, it had simply slipped her mind that she would be on vacation that week. 07/09/12 RP 3, 5. Over Anderson's

objection, the trial was reset for the week of August 13, 2012. 07/09/12 RP 7. Allowing for the 30-day cure period provided in CrR 3.3(b)(5), the last date for trial was September 13, 2012. Anderson did not file a motion to reset the trial date as required by CrR 3.3(d)(3).

On July 19, the State requested a second continuance because the investigating officer was on vacation. 07/19/12 RP 3. That continuance was granted and a new date of September 4, 2012, was set. CP 4, 07/19/RP 5. Trial commenced on September 4 and ended September 5. 09/04-05 RP.

A reviewing court will not disturb an order granting a continuance "absent a showing of a manifest abuse of discretion." State v. Cannon, 130 Wn.2d 313, 326, 922 P.2d 1293 (1996). Whether a court correctly applied CrR 3.3 is a question of law reviewed de novo. State v. Lackey, 153 Wn. App. 791, 798, 223 p.3d 1215 (2009). CrR 3.3 is not constitutionally based. State v. Hall, 55 Wn. App. 834, 841, 780 P.2d 1337 (1989). Continuances granted within the speedy trial time are not violations of the rule; dismissal is required only when the speedy trial period has expired. Unless that is the case, the defendant must demonstrate "actual prejudice" before his case will be dismissed. Id. In Anderson's

case, the second continuance was within the 30-day cure period following the first continuance. Unless the court abused its discretion in granting the first continuance, there is no violation of the speedy trial rule.

Scheduled vacations of counsel and investigating officers justify a continuance. "This is necessary to preserve the dignity of officers who would otherwise never be able to plan a vacation." State v. Torres, 111 Wn. App. 323, 330-31, 44 P.3d 903 (2002). Although Anderson agrees that a prosecutor's vacation is grounds for a continuance, he argues that because she failed to realize the conflict on June 7, her "forgetfulness" is not a permissible reason to continue the trial past the week of July 30. Appellant's Opening Brief at 10.

A reviewing court will find an abuse of discretion when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006), citing State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based "on untenable grounds" or made "for untenable reasons" if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id. A decision is "manifestly unreasonable" if

the court, despite applying the correct legal standard to the supported facts, adopts a view that "no reasonable person would take," and arrives at a decision "outside the range of acceptable choices." Id. Here it cannot be said that no reasonable person would have continued the trial for 15 days, from July 30 to August 13, because the prosecutor, who was taken by surprise by the hung jury in the first trial, and who has as many as six trials scheduled in the same week, 07/09/12 RP 4, wanted to take her vacation. As noted above, the second continuance because of the investigating officer's vacation was within the cure period and thus not a violation of CrR 3.3.

Anderson makes repeated claims that he was prejudiced by the delay but he does not explain what those are. The speedy trial right exists to protect specific interests. Those are:

> (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused, and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (footnote omitted). Anderson has made no claim that the delay impaired his ability to prepare or present a defense. The

additional incarceration, from July 30 to September 4, cannot be called "oppressive." It may not be pleasant to be in jail, but the circumstances in Anderson's case simply do not create the sort of prejudice that makes the continuance granted here unreasonable.

CrR 3.3 contemplates that continuances may be granted over the objection of a party. CrR 3.3(d)(3) provides a procedure for a party objecting to the trial date to move the court to set it within the time limits of the rule. As noted by two different judges, Anderson did not do that. 07/19/12 RP 5; 09/04/12 RP 13. While it may not be intuitive that such an objection must be made even if the defendant objected at the time the date was set, CrR 3.3(d)(3) provides that "[a] party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule."

Anderson does not show that the court incorrectly applied CrR 3.3 or manifestly abused its discretion. He does not demonstrate that his ability to defend himself was hampered in any way or that the additional period of pretrial incarceration was oppressive or caused undue anxiety, such that would outweigh the State's interest in bringing him to trial. There was no error.

2. There is no manifest error which permits Anderson to raise a challenge to his offender score for the first time on appeal. Even if the court considers his claim, the State proved by a preponderance of the evidence that Anderson had a prior California conviction for possession of a controlled substance, cocaine base.

Anderson asserts for the first time on appeal that the State failed to properly prove his California conviction for possession of a controlled substance because the California documents were uncertified. At the sentencing hearing, he did not raise any issue regarding the California conviction, but rather claimed that two of his 2004 convictions from Washington should be counted as same criminal conduct, and was upset that whereas he had thought his offender score was six, it was in fact seven. 09/25/12 RP 8.

Although Anderson does not articulate a constitutional basis for his challenge, arriving at a correct offender score implicates a due process right. In determining the offender score, the court "may rely on no more information than is admitted by the plea agreement, or admitted, or acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2). This limitation protects the defendant's due process rights to be sentenced without the court relying on false information. State v. Herzog, 112 Wn.2d 419, 431-32, 771 P.2d 739 (1989).

A failure to object to the State's summary of criminal history is not an acknowledgment such as to waive a challenge to the offender score. Id. at 482-83. The defendant must make some affirmative acknowledgement of the facts alleged by the State before the State is relieved of the obligation to present evidence. Id. It is unconstitutional to shift the burden of proof to the defendant. Id. at 482. "[C]onstitutional due process requires at least some evidence of the alleged convictions." Hunley, 175 Wn.2d at 915.

RAP 2.5(a) concerns errors raised for the first time on appeal:

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. . . .
>
> RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms. . . . Elementary rules of construction require that the term "manifest" in RAP 2.5(a)(3) be given meaning. . . . .As the Washington Supreme Court stated in State v. Scott, [cite omitted] "[t]he exception actually is a narrow one, affording review only of 'certain constitutional questions.'"

State v. Lynn, 67 Wn. App. 339, 342-43, 835 P.2d 251 (1992). In this case there is no manifest error which permits Anderson to raise the challenge for the first time on appeal.

The Lynn court described the correct analysis in these steps:

> First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis. . . . "[M]anifest" means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. "Affecting" means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient.

Lynn, 67 Wn. App. at 345.

At Anderson's sentencing, the State produced six certified Washington judgments and sentences and a number of documents from Alameda County, California, regarding Anderson's conviction there in 2001 for possession of a controlled substance. CP 101-145.

The State has the burden of proving prior convictions at sentencing by a preponderance of the evidence. State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). That burden is not met by bare assertions, unsupported by evidence. Id. at 482; State v. Lopez, 147 Wn.2d 515, 523, 55 P.3d 609 (2002). "While the preponderance of the evidence standard is 'not overly difficult to meet,' the State must at least introduce 'evidence of some kind to support the alleged criminal history.'" State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012), citing to Ford, 137 Wn.2d at 480. Unless the conviction follows a plea made pursuant to a plea agreement, the defendant has no obligation to produce evidence of his criminal history. Lopez, 147 Wn.2d aat 521. The State carries the burden because it is "inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove." In re Pers. Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988).

"The best evidence of a prior conviction is a certified copy of the judgment." State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). "The State may introduce other comparable evidence only if it is shown that the writing is unavailable for some reason other than the serious fault of the proponent." State v. Lopez, 147 Wn.2d

515, 519, 55 P.3d 609 (2002), citing to State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979). Fricks, however, merely talks about the Best Evidence Rule—a "basic principle of evidence" which requires that "'the best possible evidence be produced.'" Id.

> As applied to proof of the terms of a writing, it requires that the original writing be produced unless it can be shown to be unavailable "for some reason other than the serious fault of the proponent."

Id., citing to McCormick, *Handbook of the Law of Evidence* § 230, at 560 (2d ed. 1972).

In State v. Rivers, 130 Wn. App. 689, 128 P.3d 608 (2005), the State failed to produce a certified copy of a conviction for second degree robbery in a hearing seeking to have the defendant sentenced to life in prison as a persistent offender. What it did provide were certified copies of other judgments which showed the robbery conviction listed in his criminal history. While Rivers did not contest the authenticity of the documents, he did contest the State's position that he was a persistent offender. Id. at 697-98. The court found that because the defendant challenged those documents, the State must produce additional evidence. Id. at 701-02. "[T]he State failed to offer a court-certified copy of the 1989 second degree robbery conviction, the best evidence of that

conviction, and provided no explanation why it failed to do so." Id. at 705.

In Lopez, the State did not provide any documentary evidence of the convictions it was alleging. Lopez, 147 Wn.2d at 518. In State v. Vickers, 148 Wn.2d 91, 59 P.3d 58 (2002), the State offered a signed docket sheet from a Massachusetts court as proof of a conviction. The Supreme Court found that acceptable. "Although a certified copy of a judgment and sentence is the best evidence of a prior conviction, the State may introduce other documents of record or transcripts of prior proceedings to establish a defendant's criminal history." Id. at 120-21.

The certification of the judgment and sentence cannot be crucial to proving the conviction or the courts would not offer the alternative "or explain why it didn't." Here the State produced a number of documents, while uncertified, at least two of which carry file stamps from the Alameda County Superior Court Clerk's Office. CP 103, 110. Anderson did not contend at sentencing, and does not claim now, that the documents are not authentic or that the conviction is not, in fact, part of his criminal history.

The remedy for a violation is a remand for resentencing. The State may produce evidence at the resentencing. Hunley, 175

Wn.2d at 915-16. Even if it were error for the court to accept an uncertified document as proof of the California conviction, the remedy is to remand for resentencing so the State can either produce a certified copy or explain why it cannot. This is not a manifest error. At most it is a harmless error, since the likelihood that Anderson's offender score will change on remand because of the California conviction is next to none.

> 3. It was error for the sentencing court to fail to consider Anderson's prior convictions to determine if they constituted the same criminal conduct. The court was correct that the defendant bears the burden of proving that one or more convictions constitute the same criminal conduct.

At sentencing the State produced certified copies of judgments and sentences for prior convictions in Thurston County. Defense counsel advised the court that Anderson believed the crimes he committed in 2004 should count as same criminal conduct for purposes of scoring. 09/25/12 RP 8. There is no indication in the record that the State had been previously informed of his contention. Counsel further informed the court that the unlawful imprisonment and second degree assault convictions from 2004 involved crimes committed against the same victim on the same date. 09/25/12 RP 12. The court responded that it had no

information regarding the prior convictions and the defendant had produced no evidence to support a conclusion that his offender score was less than seven. 09/25/12 RP 11-12.

The calculation of an offender score is not a simple matter. The basic rules are codified in RCW 9.94A.525, which, in regard to same criminal conduct, provides:

> (5)(a) In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:
>
> (i) Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether these offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations[.]

RCW 9.94A.525(5)(a)(i).

RCW 9.94A.589(1)(a), provides, in pertinent part:

> [I]f the court enters a finding that some or all of the current offenses encompass the same criminal

> conduct then those current offenses shall be counted as one crime. . . . "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

The judgments and sentences produced by the State show that the sentencing court in those cases did not count any of the offenses as the same criminal conduct. CP125 (the box indicating same criminal conduct is not checked), CP 128 (no entry in section providing for concurrent sentencing with any other felony cause numbers), 139 (no entry in section providing for concurrent sentencing with any other felony cause numbers). It is also apparent that second degree assault and unlawful imprisonment would not constitute the same criminal conduct because the intents are different. An assault is an intentional act, State v. Chaten, 84 Wn. App. 85, 87, 925 P.2d 631 (1996), while the mental state required for unlawful imprisonment is only knowledge. RCW 9A.40.040 ("A person is guilty of unlawful imprisonment if he knowingly restrains another person.")

Nevertheless, it is clear that RCW 9.94A.525(5)(a)(i) requires a sentencing court to apply the same criminal conduct test to multiple prior convictions. State v. Torngren, 147 Wn. App. 566, 563, 196 P.3d 742 (2008), *superceded on other grounds*, State v.

Winborne, 167 Wn. App. 320, 273 P.3d 454, *review denied*, 174 Wn.2d 1019 (2012); *abrogated on other grounds*, State v. Graciano, 176 Wn.2d 531, 295 P.3d 219 (2013). Under the circumstances of Anderson's sentencing, the court should have continued the sentencing to permit Anderson to present evidence that some or all of the 2004 convictions should be counted as the same criminal conduct.

The State disagrees with Anderson's argument that the court improperly shifted the burden of proof to the defendant to prove same criminal conduct. Appellant's Opening Brief at 14-15. It is true that the State bears the burden of proving the prior convictions by a preponderance of the evidence, but the defendant bears the burden of proving same criminal conduct. Graciano, 176 Wn.2d at 538-540.

The court in Graciano was addressing the standard of review applicable to a trial court's determination of same criminal conduct and held that the appropriate standard is abuse of discretion. Id. at 535. A court abuses its discretion when the facts permit only one conclusion and the court decides to the contrary. Id. at 538. If the record supports either conclusion, the court's decision will not be disturbed. Id. Germane to that determination is the question of

which party bears the burden of proving same criminal conduct. The court in Graciano concluded that it is the defendant. The State understands that Graciano was specifically addressing other current offenses, not prior convictions. Graciano, 176 Wn.2d at 539. However, other current offenses are counted as prior convictions for purposes of calculating the offender score, RCW 9.94A.589(1)(a), and the same reasoning should apply to both prior convictions and other current offenses. The Graciano court said:

> It is because the existence of a prior conviction favors the State (by increasing the offender score over the default) that the State must prove it. . . .
>
> In contrast, a "same criminal conduct" finding favors the defendant by lowering the offender score below the *presumed* score. . . . Because this finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct. . . .
>
> The scheme—and the burden—could not be more straightforward: each of a defendant's convictions counts toward his offender score *unless* he convinces the court that they involved the same criminal intent, time, place, and victim. . . The decision to grant or deny this modification is within the sound discretion of the trial court and, like other circumstances in which the movant invokes the discretion of the court, the defendant bears the burden of production and persuasion.

Graciano, 176 Wn.2d at 539-40, emphasis in original, internal cites omitted.

Anderson argues that at remand for resentencing, the State is precluded from producing evidence regarding the prior convictions. Because the defendant bears the burden of proving same criminal conduct, the State is not precluded from producing, if it chooses to, evidence that the crimes do not constitute the same criminal conduct. The State cannot be penalized for failing to do something it (1) had no notice would be at issue, and (2) did not have the burden to produce in the first place. Graciano, *supra*; State v. Bergstrom, 162 Wn.2d 87, 97-98, 169 P.3d 816 (2007).

D. CONCLUSION.

There was no violation of Anderson's speedy trial rights and the State adequately proved the California conviction. The State concedes that the matter should be remanded for the trial court to consider whether some or all of Anderson's prior convictions constitute the same criminal conduct, for which Anderson bears the burden of proof.

Respectfully submitted this 29th day of May, 2013.

Carol La Verne, WSBA# 19229
Attorney for Respondent

THURSTON COUNTY PROSECUTOR

May 29, 2013 - 9:27 AM

Transmittal Letter

Document Uploaded: 439859-Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 43985-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Caroline Jones - Email: **jonescm@co.thurston.wa.us**

A copy of this document has been emailed to the following addresses:
cathyglinski@wavecable.com